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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6615

ORIGINAL COPY

HENRY ARTHUR DRAKE,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether Petitioner's rights were violated by the prosecutor's use of allegedly inconsistent theories in the trials of Petitioner and his co-perpetrator?

2.

Whether the prosecutor's closing argument during the penalty phase of the trial resulted in the imposition of the death penalty under the influence of passion, prejudice or other aribtrary factors?

3.

Whether Ga. Code Ann. § 27-2534.1(b)(7) is overly broad and vague as applied to this case and in accordance with the principles set out by this Court in Godfrey v. Georgia, 27 Cr. L. 3115, decided May 19, 1980?

4.

Whether the state habeas corpus court properly applied this Court's decision in Sandstrom v. Montana, ___U.S.___, 61 L.Ed.2d 39 (1979)?

PART ONE

STATEMENT OF THE CASE

Petitioner, Henry Arthur Drake, was tried in the Superior Court of Madison County for the offenses of murder and armed robbery. Following a jury trial, he was sentenced to life imprisonment for the armed robbery conviction and received the death sentence for murder. On direct appeal to the Supreme Court of Georgia in its mandatory review of the death penalty, Petitioner's convictions and sentences were affirmed. Drake v. State, 241 Ga. 583 (1978). A petition for writ of certiorari from the judgment of the Supreme Court of Georgia was denied by this Court on February 20, 1979.

The Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia and a hearing was held in connection with the allegations raised by means of this petition in the Superior Court of Butts County, Georgia on July 26, 1979. The state habeas corpus court denied Petitioner the relief sought by its order of December 14, 1979.

For purposes of this petition, the evidence produced at Petitioner's trial in the Superior Court of Madison County should be examined. The evidence produced at trial showed the following:

Mr. C. E. Eberhart resided in Culbert, Georgia and ran a barber shop in that community. (T. 284). Mr. Eberhart resided with his invalid wife a short distance from his barber shop. (T. 276). Mr. Eberhart was 74 years old and he and his wife drew social security. Mr. Eberhart cashed his social security checks on December 4, 1975 for "something over $300.00." (T. 279-280), and at noon on December 5, 1975, carried in his billfold two or three hundred dollars in cash. (T. 273-277).

On December 5, 1975, darkness began to set in around 6:00 p.m. (T. 284). Just as it was "getting close to dark" a neighborhood boy walked by Mr. Eberhart's barber shop. He was alone, seated in his barber chair. He and the boy exchanged waves of their hands. (T. 287-288). Shortly thereafter, Mr. Eberhart began to sweep up the hair on the floor of his barber shop, in preparation for closing the shop. A short, diminutive, crew-cut stranger came into the shop for a haircut. (T. 168). This stranger to the community was William (Bill) Campbell. Mr. Campbell's companion, the Petitioner, Henry Arthur Drake, was a life-long resident of Culbert, Georgia, who knew both Mr. Eberhart and his shop. (T. 425). Mr. Drake came in the barber shop in disguise, wearing a black wig. (T. 168). He demanded the victim's money and told the victim he "was gonna rob him and take his money." (T. 169). Armed with a hammer, the Petitioner then beat the victim repeatedly. (T. 170-171). Only after a tremendous struggle had taken place involving both Mr. Drake, Mr. Campbell and Mr. Eberhart, did the Petitioner succeed in subduing Mr. Eberhart.

At 9:00 p.m. that evening, Mr. Eberhart had not returned home so his worried wife summoned a neighbor to go and check on him. The neighbor found Mr. Eberhart lying in the floor of the shop, with blood all over him. The door to the shop was open and the lights were on. No one else was there when the neighbor arrived. The neighbor notified Sheriff Jack Fortson who immediately rushed to the scene. (T. 290-293).

The barber shop reflected the tremendous struggle that had taken place there. (T. 353). There was a large quantity of blood all over the area. The area was described as having a "considerable amount of blood all over the floors, walls, barber chair, cabinets, sink and both doors, with a large pool of blood in the bathroom." Shoe marks, heel marks and wipings, evidenced

the struggle. (T. 353). At Petitioner's trial, photographs were introduced into evidence which depicted the crime scene. (State's Exhibits 15 through 33).

The injuries sustained by Mr. Eberhart were described by various witnesses as follows: "He was down on his knees and sounded like he was trying to talk. He was incoherent and covered with blood. He was hardly recognizable with his head and eyes swollen, and his glasses knocked off." (T. 296). Sheriff Fortson testified that there was one spot in the front of his head that you could "lay a fist in." (T. 308-309). Mr. Eberhart's daughter saw her father on the night he was injured and stated that his head was swollen five times the normal size and his eyes were closed against his eyelids. (T. 400). One of Mr. Eberhart's attending physicians testified that Mr. Eberhart had a stab wound in the chest, multiple lacerations to his scalp, a very swollen head and was in a comotose state. The physician testified that Mr. Eberhart had been beaten by some blunt type instrument and that the injuries were consistent with those that are made by a claw hammer. (T. 150-152). Mr. Eberhart remained unconscious for a long period of time and finally died as a result of these injuries on March 21, 1976. T. 153-155, State's Exhibit No. 1).

Sheriff Fortson had examined Mr. Eberhart as he lay in the barber shop. Mr. Eberhart's pants pockets were pulled inside out and emptied. The sheriff searched but could not find any money or a wallet on Mr. Eberhart or in the barber shop. (T. 314-315). A search of the premises outside the barber shop on the night of the crimes revealed that some barber tools were found wrapped up in a barber's cloth on the side of the barber shop. Also found by investigating officers was a claw hammer in the back metal bed of a dump truck (State's Exhibit No. 11), located ten to fifteen feet from the barber

shop building. (State's Exhibit No. 5) (T. 296). The barber shop was examined by a person from the State Crime Laboratory and only three legible fingerprints were lifted from the shop.

Blood samples were also taken from various places in the barber shop. (State's Exhibit No. 4). These samples were examined along with a sample of the blood of the victim, by the State Crime Laboratory. Both samples were type "O". (T. 266). Mr. Campbell's blood sample was examined and found to be type "A". One particular sample of blood obtained from outside the from door (State's Exhibit No. 3), was examined and found to be type "A". An examination of the claw hammer (State's Exhibit No. 5), was also found to have type "A" blood on the handle. (T. 263-266). Henry Drake's blood was determined to be type "O". (T. 271).

Sheriff Jack Fortson and Charles Stone of the Georgia Bureau of Investigation investigated the robbery and murder of Mr. Eberhart. (T. 306, 325). Their investigation revealed the following evidence and produced the testimony of the following witnesses:

Curtis James ran a dry cleaning establishment across the street from the victim's barber shop. (T. 282). On December 5, 1975, at about 5:00 p.m., he saw Mr. Campbell around his car, which was then parked on the street between his business and the victim's barber shop. He closed his dry cleaning establishment at about 6:00 p.m. and as he departed he saw lights on in the victim's barber shop. He testified that Mr. Eberhart weighed around 200 pounds, was six feet tall and was very active for his age. (T. 291).

The victim had received a Timex watch from his daughter on Father's Day in 1975, which he wore regularly. It had easy to read numerals and a "black plastic band". The victim's daughter notified the police that it was missing. (T. 398-340) (State's Exhibit No. 7).

A consent search on December 11, 1975 of the house occupied by Mary Caruth and the Petitioner, Henry Drake, in Madison, Georgia, turned up the victim's Timex watch (State's Exhibit No. 7), in a dresser drawer at the house. The watch was examined by a G.B.I. agent and found to have blood on it. (T. 254). Mr. Eberhart's daughter identified the watch (State's Exhibit No. 7), as being the watch she had given to her father and testified that the watchband looked like the band on the watch her father wore regularly. (T. 401-402, State's Exhibit No. 8).

Mary Caruth testified that she, the Petitioner, and Mr. Campbell, lived together in Culbert, Georgia in a two bedroom house and that the three of them moved from Culbert to Madison, Georgia. (T. 377). On the evening that Mr. Eberhart was killed, the three of them went to Culbert and let Mr. Campbell out to go to the barber shop. (T. 379). Ms. Caruth testified that she and the Petitioner went to Drake's mother's house where they stayed until "five minutes until 10:00 p.m." and Ms. Caruth testified that they then went and picked Mr. Campbell back up at the laundromat across the street from the barber shop. (T. 381-382).

Ms. Caruth testified that the three of them went straight back to Madison to their house, riding together in the front seat of the car. She stated that they did not leave the house during the night but that the following morning, she and the Petitioner went back over to his mother's house in Culbert. (T. 383). Ms. Caruth testified that she heard that Friday night that Mr.

Eberhart had been beaten up with a hammer on the 9:30 to 10:00 p.m. radio news. (T. 388).

At one point, Ms. Caruth testified that she had not seen Mr. Campbell when he left their house in Madison, Georgia, on the next Saturday, but later testified that Mr. Campbell had a gun and threatened to kill her if the Petitioner did not drive him from Madison. (T. 386). She testified that Campbell held the gun to her head and that she heard Campbell tell the Petitioner, "I believe I killed a man."

However, Ms. Caruth's testimony did implicate the Petitioner in the crime because she testified that the Petitioner had a knife with black handles and a tree-shaped figure on it. (T. 390). This description fit one of the knives found in the barber shop.

William Campbell testified against the Petitioner. He stated that he knew the Petitioner and Ms. Caruth and they all lived together for a month or two in Culbert, Georgia, and then moved to Madison, Georgia. (T. 157-158). He stated that at about 5:00 p.m. on December 5, 1975, the three of them drove from Madison to Culbert so that he could get a hair cut in a small barber shop located in a brick building across from the laundromat. (T. 160-162). When asked if he saw the Petitioner at the barber shop, Mr. Campbell did not answer until the question was repeated three times, at which time he stated, "I ain't got nothing to say about that." (T. 165-166). However, the court instructed the witness to answer the question and he testified that he saw the Petitioner enter the barber shop when it was getting dark. (T. 167). Mr. Campbell stated that he was getting his hair cut and did not recognize the Petitioner when he came in, because he had a wig on his head. (T. 168). Mr. Campbell stated that the Petitioner told the victim that he "was gonna rob him and take his money" and that he then hit the barber with a hammer. (T. 168).

Mr. Campbell stated that he told the Petitioner not to hit the old man and to leave him alone, at which point Petitioner hit him with the hammer. (T. 169). Mr. Campbell testified that the Petitioner hit the barber more than one blow with the hammer. He further testified that he saw some knives at the barber shop. (T. 171). Mr. Campbell observed the Petitioner taking something out of the pockets of the victim. (T. 174). Mr. Campbell stated that they remained at the barber shop about ten to fifteen minutes and that although he had gotten some blood on himself during this time, he washed it off and then returned to Madison. (T. 172-173).

Mr. Campbell identified the victim's watch and stated that Henry Drake had it. The Petitioner did not have it before the murder and robbery but Mr. Campbell saw him wearing it the next morning. (T. 173; 183). Mr. Campbell also stated that the Petitioner had a hammer that night and that he had hit him and the victim with it. Later, Mr. Campbell had picked up this hammer and threw it in a truck parked at the barber shop. (T. 175).

Mr. Campbell stated that Mary Caruth was behind the barber shop during the incident there. Their car was parked at a store and after the crimes at the barber shop, they all got in the car and left together, driving to a graveyard and drinking beer. (T. 176-177). Mr. Campbell stated that he went to sleep and when he woke up they were back in Madison. (T. 178). Beer bottles fitting the description given by Campbell, were found by the sheriff and a G.B.I. agent in the cemetary in Culbert. (T. 317-318; 323).

Campbell testified that the morning after the crimes, Ms. Caruth and the Petitioner went to Culbert. Upon their return, they told him he had to leave Madison and took him to Atlanta,

letting him out on Peachtree Street and giving him a $20.00 bill. (T. 179-180).

On cross-examination, Mr. Campbell testified that he tried to pull the Petitioner off the victim. The victim reached up and pulled the wig from Petitioner's face, stating, "Lords sakes, I didn't think you would do that." (T. 208). Mr. Campbell also stated that neither he nor the Petitioner had any money the Friday afternoon before the robbery. (T. 237).

G.B.I. Agent Stone testified as to a statement that the Petitioner had made prior to his arrest in which the Petitioner claimed that he had let Mr. Campbell out at the barber shop to get a hair cut and that he and Mary Caruth had gone to his mother's house and stayed about two hours, later coming back and picking up Mr. Campbell in front of the Laundromat. (T. 342). The Petitioner also took the stand in his own defense at the trial and made a similar statement to the jury.

Further facts will be developed as is necessary for a more thorough understanding of any issues raised by this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE STATE HABEAS CORPUS COURT PROPERLY HELD THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE PURSUANCE OF ALLEGEDLY INCONSISTENT THEORIES IN THE PROSECUTION OF PETITIONER AND HIS CO-PERPETRATOR.

Petitioner asserts that the State took a contradictory approach in their prosecution of the Petitioner and his co-perpetrator, William Campbell, thereby breaching the prosecutorial obligation of good faith and resulting in a denial of Petitioner's right to a fair trial. The state habeas corpus court considered this claim and although finding that the State pursued inconsistent approaches in these two cases, found that if anyone had a right to complain that their rights were violated in this regard, it was the Petitioner's co-perpetrator and not the Petitioner. The state habeas corpus court properly found that no prejudice resulted to the Petitioner from an allegedly earlier inconsistent approach taken by the State in the Campbell case.[1/]

While the state habeas corpus court recognized the constitutional issue involved, it also recognized that the Petitioner was not the

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1/ The State is not willing to concede that inconsistent approaches were taken in the case of the co-perpetrator, but rather would reiterate to this Court what was asserted at the state habeas corpus hearing, that the prosecution of the two cases was not inconsistent, as both the Petitioner and Mr. Campbell were, in the State's view, equally culpable in the armed robbery and murder of Mr. C. E. Eberhart. The fact that Mr. Campbell was in poor health and perhaps could not have completed these crimes alone, does not in any way lessen either his culpability or that of the Petitioner, as the State has consistently asserted that both the Petitioner and Mr. Campbell were equally involved and equally culpable. The fact that Mr. Campbell asserted at Mr. Drake's trial that he was not involved, but was merely present, does not affect the State's position, taken during Mr. Campbell's trial, that he was equally culpable with the Petitioner.

proper party to assert this constitutional right as, no prejudice resulted to him from the fact that the State allegedly pursued the theory that Mr. Campbell had committed the crimes in his case, while asserting in the Petitioner's trial, that although Mr. Campbell was present, Mr. Drake actually committed the crimes. As can be seen from the Statement of the Case portion of the brief, Mr. Campbell testified at the Petitioner's trial, and provided direct evidence of his guilt. As Petitioner has shown no prejudice resulting from any constitutional right which may have been violated, there is no federal question presented to this Court for its review.

B. THE STATE HABEAS CORPUS COURT PROPERLY FOUND, IN ACCORDANCE WITH THE DECISION OF THE SUPREME COURT OF GEORGIA, THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE.

The Petitioner argues that his rights to due process were denied because during the prosecutor's closing argument in the penalty phase of his trial, the prosecutor quoted from the Georgia cases of Eberhardt v. State, 47 Ga. 598 (1873) and Hawkins v. State, 25 Ga. 207 (1858).

The state habeas corpus court in examining this contention made by the Petitioner, noted that the Georgia Supreme Court had already ruled on this issue. The Georgia Supreme Court noted that state law in Hawes v. State, 240 Ga. 327, 336 (1977), had outlawed the practice of reading from such cases as Eberhart v. State, supra, to persuade a jury to impose the death penalty. However, the Georgia Supreme Court noted that as in the case of Petitioner's co-perpetrator, the prosecutor had not been reading from these cases in addressing the jury, but rather was addressing the court. Drake v. State, 241 Ga. 583, 587 (1978). The Georgia Supreme Court stated, "We held in Campbell that the presence of the jury during such arguments did not bring the argument within the scope of Hawes, though it would be preferable if such argument were conducted outside of the jury's presence." The Georgia Supreme Court also found that a brief reference to Gary Gilmore in the prosecutor's closing argument was also made

to the trial court and was therefore not likely to inflame the passions or prejudices of the jury.

The state habeas corpus court found this contention to be without merit, as the Supreme Court of Georgia had rendered an adverse ruling to the Petitioner in connection with this issue.

The record shows that the district attorney prefaced his reference to Hawkins v. State, 25 Ga. 207 (1857), with the statement, "If Your Honor please, in connection, in my urging you to submit this to the jury. . . ." (T. 513). Similarly, the district attorney prefaced his reference to Eberhardt v. State, 47 Ga. 598, 610 (1873), with the statement, "If Your Honor please . . . ." (T. 513).

It should also be noted that the trial transcript reflects that counsel for the Petitioner did not object to this portion of the charge until after the closing statements had been concluded and the jury had retired. (T. 525-526). However, the trial court offered to recall the jury and have them recharged, but counsel for the Petitioner stated that he had rather, "leave it like it is." (T. 528).

In finding this contention to be without merit on Petitioner's direct appeal to the Supreme Court of Georgia, that court noted its decision in Presnell v. State, 241 Ga. 49, 62 (1978), in which the court held that this type of argument may in fact be harmless error. As the Georgia Supreme Court has properly interpreted state law and as the state habeas corpus court properly followed the ruling of the highest court within the state, this case involves merely an interpretation of state law and presents no federal question for this Court's review.

C. GA. CODE ANN. § 27-2534.1 (b)(7) IS NOT OVERLY BROAD AND VAGUE AS APPLIED TO THE FACTS PRODUCED AT PETITIONER'S TRIAL.

Petitioner argues that the statutory aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) is overly broad and vague so as to render Petitioner's death sentence based upon this aggravating circumstance, unconstitutional. The jury at Petitioner's trial found the existence of the statutory aggravating circumstance set forth in Ga. Code Ann. § 27-2534.1 (b)(7), i.e., that the offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture, depravity of mind and an aggravated battery to the victim. However, as noted by the state habeas corpus court, the jury also found the existence of an additional statutory aggravating circumstance as set forth in Ga. Code Ann. § 27-2534.1(b)(2), i.e., that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, i.e., the armed robbery of C. E. Eberhart. (T. 529). Therefore, even on this basis, this case can instantly be distinguished from the facts of Godfrey v. Georgia, 27 Cr. L. 3115, decided May 19, 1980, in which this Court considered whether or not the statutory aggravating circumstance contained in Ga. Code Ann. § 27-2534.1 (b)(7), was unconstitutional as applied to the facts of that particular case.

This Court held in Godfrey v. Georgia, supra, that the validity of Mr. Godfrey's death sentences turned on whether, in light of the facts and circumstances of the murders that Mr. Godfrey had been convicted of committing, the Georgia Supreme Court applied a constitutional construction of the phrase "outrageously or

wantonly vile, horrible or inhuman, in that they involved depravity of mind." The court concluded that in that case the phrase had been unconstitutionally applied. However, this Court noted in Godfrey v. Georgia, that this particular statutory aggravating circumstance was found not to be unconstitutional on its face in the court's own decision in Gregg v. Georgia, 428 U.S. 153 (1976).

Examining the facts and circumstances of the instant case, it is apparent that this statutory aggravating circumstance was properly found by the jury and properly applied to the facts and circumstances of this case. In addition to the evidence produced at trial referred to in Part I of this brief, it should be noted that Dr. Joseph P. Williams, a neurological surgeon, testified that the victim had multiple injuries, including a stab wound to his right chest and multiple head injuries. He stated that the victim had multiple places where the skull had been crushed and pushed into his brain. (T. 149-150). Dr. Williams testified that the victim had a wound on his right forehead and that his eyes were completely swollen shut. Dr. Williams testified extensively about the numerous wounds to the head and stated that one wound in the left frontal area revealed that the bone and skull had been crushed into the brain and the eye. (T. 151). Dr. Williams testified that these types of injuries would occur as the result of being hit with a very hard, blunt object. (T. 152). He also testified that these wounds were consistent with those that could be inflicted by a claw hammer. (T. 152). Dr. Williams testified as to the extensive surgery to the brain which was necessary and testified that on March 23, 1976, the victim died from multiple injuries to the brain. (T. 155). This was, of course, several months after Mr. Eberhart had been beaten and robbed in his barber shop. As previously noted, Sheriff Fortson who discovered the body testified that in the top portion

of Mr. Eberhart's forehead there was a wound which one could almost "lay your fist in." (T. 307). As noted by the Georgia Supreme Court, the victim was over 70 years old at the time of the commission of the crimes.

Respondent contends that examining the facts and circumstances of the instant case, it is apparent that this particular statutory aggravating circumstance was properly found by the jury and also properly applied to the facts and circumstances of this case. The Georgia Supreme Court properly concluded that this aggravating circumstance as well as the additional circumstance was supported by the evidence. Drake v. State, 241 Ga. 583, 588 (1978). As the state habeas corpus court properly noted, even should this Court determine that this particular aggravating circumstance is unconstitutionally applied in the instant case, this would not provide grounds for any relief to the Petitioner, because of the fact that an additional aggravating circumstance was used to authorize the imposition of the death penalty. This contention by the Petitioner presents nothing which need be reviewed by this Court at this time.

D. THE STATE HABEAS CORPUS COURT PROPERLY APPLIED SANDSTROM V. MONTANA, ___ U.S. ___, 61 L.Ed. 2d 39 (1979), AS PROHIBITING CONCLUSIVE PRESUMPTIONS.

Petitioner contends that the trial court's instruction that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act" had the effect of shifting the burden of proof on the question of malice to the Petitioner so that the State was no longer forced to prove malice beyond a reasonable doubt. Petitioner contends that the state habeas corpus court improperly interpreted this Court's decision in Sandstrom v. Montana, supra, to apply only where the charge creates a conclusive presumption. The charge in Sandstrom v. Montana, was objected to on the same basis as Petitioner now seeks to attack the charge given at his trial. Defense counsel in Sandstrom, objected to the instruction on the basis that it would shift the burden of proof on the issue of purpose or knowledge to the defendant and that this would be a violation of due process under the federal constitution. This Court proceeded to find that this instruction was unconstitutional, because the jury might have interpreted the challenged presumption as conclusive or as shifting the burden of persuasion and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. This Court noted that the juror's in Sandstrom's case were merely told, "the law presumed that a person intends the ordinary consequences of his voluntary acts", and that the jury was not told that they had a choice or that they might infer such a conclusion, but were merely told that the law presumed it.

Additionally, this Court observed that in Sandstrom, the jurors were not told that the presumption could be rebutted by the defendant's presentation of "some evidence", nor even that it could be rebutted under any circumstances. Based on this reasoning, the Supreme Court found that a reasonable juror could have interpreted the presumption as being "conclusive."

The instruction given in this case cannot be viewed in isolation and Petitioner has failed to cite all the material portions of this charge which are necessary to construe the meaning that reasonable jurors would have given this charge during Petitioner's trial. The pertinent portions of the trial court's charge on intent read as follows:

> "Ladies and Gentlemen, I charge you that a criminal intent is a material and necessary ingredient in any criminal prosecution. I charge you that the acts of a person of sound mind and discretion are presumed to be the products of a person's will and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but both of these presumptions may be rebutted. I charge you, however, that a person will not be presumed to act with criminal intent but the trials [sic] of fact may find such intent from consideration of the words "conduct, demeanor, motive and all other circumstances connected with the act to which the accused is here prosecuted. You are the triers of the fact; therefore, it is a question of

fact solely for your determination as to whether or not there was a criminal intent on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deducting the deductions which might reasonably be drawn from these facts and circumstances. Now while a criminal intention may be proven in more than one way, the question of whether the defendant did act with criminal intention is finally and always a question for you, the jury, to determine."

(T. 484-485).

Respondent submits that the fact that the jury was specifically informed that this was a rebuttable presumption and were told that a person will not be presumed to act with criminal intention, negates any finding that a reasonable juror would have interpreted the challenged presumption as being conclusive or as shifting the burden of persuasion to the Petitioner.

The state habeas corpus court's decision was not in error, as that court stated that it was the conclusiveness of the presumption in Sandstrom that offended the constitution. This is a true statement. The fact that the charge might also have been unconstitutional as being susceptible to interpretation as shifting the burden of persuasion, is just an additional reason why such charges as those in Sandstrom, were outlawed. The state habeas corpus court does not hold that the charge must create a conclusive presumption in order to be burden-shifting under Sandstrom v. Montana. The court only stated that the conclusiveness of the presumption was found in Sandstrom to offend constitutional principles.

As the state habeas corpus court properly interpreted this Court's decision in Sandstrom v. Montana, and as the charge given in this case is clearly distinguishable from that examined by this Court in Sandstrom, this contention by the Petitioner presents nothing for review by this Court.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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